

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 96M-97

May 9 9 22 AM '96

61282

In re Applications of	)	WT DOCKET NO. 96-41	
LIBERTY CABLE CO., INC.)		
)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

MEMORANDUM OPINION AND ORDER

Issued: May 6, 1996

;

Released: May 8, 1996

Background

1. This is a ruling on a "Motion To Delete Issue Pursuant To 47 C.F.R. §1.229" that was filed by Liberty Cable Co. Inc. ("Liberty")¹ on April 9, 1996. Oppositions were filed by the Wireless Telecommunications Bureau ("Bureau") on April 18, 1996, and by Time Warner Cable of New York City and Paragon Cable Manhattan (collectively "Time Warner") on April 19, 1996. Replies were filed by Liberty on April 25, 1996.²

¹ Liberty is now incorporated as Bartholdi Cable Co., Inc. The Motion To Delete was filed by "Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. ("Liberty")", but references in the Motion are made to "Liberty". The Bureau uses "Liberty" while Time Warner uses "Liberty/Bartholdi." The caption of the case continues to reflect Liberty Cable Co., Inc., the past actions which are the subject of this hearing were those of Liberty, and the documentary evidence will make reference to Liberty. Therefore, to avoid confusion in the record, except for specificity in a ruling or an order, the party now known as Bartholdi Cable Co., Inc. shall be referred to as "Liberty."

² Liberty represents that in fn. 6, there was an error in a date and an erroneous representation that there was no requirement articulated by NYC that Liberty was required to maintain a local franchise. These errors were reported in a letter to the Presiding Judge dated May 2, 1996. The Rules do not permit corrections to pleadings to be made on the basis of a letter after the pleading cycle has closed. Counsel must file an appropriate Erratum or Statement For The Record. Liberty is limited in its corrective pleadings to comment on its own pleadings and not the pleadings of Time Warner.

FCC MAIL SECTION

May 9 9 22 AM '96
Rules provide for the filing of a motion to delete issues within fifteen (15) days of the publication of the issues in the Federal Register. Reasons must be stated for any later filing. The motion must contain:

specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice is taken, shall be supported by affidavits of a person or persons having personal knowledge thereof.

See 47 C.F.R. §9(a)(b)(c) and (d). There were no affidavits or declarations filed by Liberty in support of its Motion.

Facts

3. On March 5, 1996, the Commission issued a Hearing Designation Order and Notice of Opportunity for Hearing, In re Applications of Liberty Cable Co., Inc. (FCC 96-85) ("HDO"). The subject matters of the HDO are fifteen (15) applications of Liberty for the construction and operation of OFS microwave facilities in New York City. A summary of the HDO was published in the Federal Register (61 Fed. Reg. 11,839) on March 22, 1996. A timely motion to delete would have been filed on April 8, 1996; Liberty's Motion was filed late by one day. Although the Rule requires a showing of cause for the consideration of a late filing, Liberty offers none. Liberty only argues that because the parties were served with facsimiles of the Motion on April 8, none of the parties were prejudiced. While that may be true, the Commission has set procedures which must be complied with and a variance from a time period set by the Rules for moving to delete an issue can only occur if good cause is shown for the delay. Since Liberty has not shown any cause for its one day delay in filing, it is not entitled to any relief as a matter of procedure.³

³ There are additional reasons advanced by the Bureau for denying the Motion due to insufficient copies of pleadings. But no party was prejudiced by reason of Liberty's filing procedures in connection with this Motion To Delete. Counsel for all parties were furnished copies of the Motion via fax on April 8, 1996. The failure to file the required six copies with the Commission Secretary was cured the next day and the next-day filing of those copies did not effect the parties ability to respond within the prescribed ten day period. 47 C.F.R. §1.294(c). The Presiding Judge also was served timely with courtesy copies. However, the parties are again cautioned to file in accordance with the Rules. See Order FCC 96 M-34, released March 13, 1996 (parties are expected to be familiar with Rules of Practice).

Discussion

4. If the Motion were timely filed, it also would be denied on the merits. This case was set for a hearing by the Commission, inter alia:

To determine the facts and circumstances surrounding Liberty Cable Co., Inc.'s operation of hardwired interconnected, non-commonly owned buildings, without first obtaining a franchise. [Citations omitted.]

HDO at Para. 5. The arguments advanced by Liberty may be reduced to three basic contentions: (1) because of the unreadiness of local application procedures it was impossible for Liberty to seek to obtain or to obtain a franchise throughout the entire period at issue; (2) there were parallel uncertainties in dealings with the Commission due to Constitutional issues that were winding through the Federal Courts; and (3) with the passage of the Telecommunications Act of 1996, Liberty is no longer required to apply for a local franchise since it was not using public property or rights of way.

5. The relief sought by Liberty is in the nature of a partial summary decision (issue deletion having same effect) which would be denied because of the complexity of the facts and circumstances that must be considered in a full hearing.⁴ Also, the HDO includes a related charge of failure to report the unfranchised operations under the Commission's reporting requirements [47 C.F.R. §1.65] which requires evidence on knowledge and intent. Cf. Hampshire County Broadcasting Co., Inc., 3 F.C.C. Rcd 6137 (1988). Nor does Liberty's Motion address an ultimate issue to determine whether a past unlawful unfranchised operation in violation of the Communications Act has any bearing on Liberty's qualifications to be a Commission licensee. HDO at Paras. 12-13. Instead, Liberty attempts to frame its request for issue deletion on unverified assertions that Liberty could only operate its cable facilities with hardwiring and that it was frustrated in its efforts to obtain a franchise to install hardwire. But Time Warner cites a judicial ruling to the contrary holding that Liberty was required to operate its hardwire cable activities with a franchise. Liberty Cable Company, Inc. v. City of New York, 60 F.3rd 961, 964 (2nd Cir. 1995) (court disagrees with contention that NYC could not require franchise without having a licensing procedure). And the Bureau notes that there was an

⁴ A favorable summary decision could only be granted where there is a showing by affidavit or testimony or comparable reliable evidence of record that there was no genuine issue of material fact for determination at a hearing. 47 C.F.R. §1.251 (a) (1). Affidavits must be based on personal knowledge and shall set forth facts which are admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. 47 C.F.R. §1.251(c). There are no affidavits or similarly reliable forms of evidence to consider at this time.

available alternative to apply for and obtain a Commission microwave license which would not require a franchise. Issue deletion will not be granted as a proxy for summary decision where there are genuine issues of material fact that must be considered at a hearing.⁵

6. Even on the narrow question of issue deletion, Liberty's Motion must be denied. The Commission considered relevant facts and circumstances which are stated in detail in the HDO. Liberty asserts in its Reply that the facts set forth in the HDO have failed to include Liberty's version of the total universe of the relevant facts. But that is what the hearing process under the APA is designed to accomplish: an ultimate decision that is based on a complete record that is made by the parties and then used by the parties in proposed findings and conclusions. See 5 U.S.C. §554 (APA Adjudications). A presiding judge can rule as an interlocutory matter on the merits of a motion to delete only in cases where there has been a showing that the facts on which the Commission has relied in setting the issue are obviously mistaken or are clearly erroneous. Otherwise, a presiding judge has no authority to delete the issue. See Frank H. Yemm, 39 Radio Reg. (P&F) 1657, 1658-59 (1977) and Anax Broadcasting, Inc. 87 F.C.C. 2d 483, 486 (1981). See also Atlantic Broadcasting Co., 5 F.C.C. 2d 717, 720-21 (1966) cited with approval in Ft. Collins Telecasters, Partnership, 103 F.C.C. 2d 978, 983-84 (Review Bd. 1986). Since Liberty only urges facts which are not established by affidavit and which do not appear in the four corners of the HDO, there is no basis for ruling that the Commission had been mistaken on the facts set forth in the HDO.

7. Liberty further contends that there are certain additional facts which must be set forth in the HDO because they are dispositive of the issue: (1) it was only after Liberty initiated a lawsuit that the City of New York established a franchise procedure; (2) a local franchising authority held that a franchise was not needed for Liberty's system which did not utilize a public right of way; and (3) Liberty had no other means to apply for a cable franchise. But Liberty fails to offer proof that the Commission was not sufficiently aware of the operative facts when the HDO was crafted and issued. It appears from the HDO that the Commission found a substantial issue of fact concerning Liberty's unfranchised cable connections which is consistent with the Second Circuit's holding, supra. And there is no authority cited by Liberty which holds that a hearing designation order must specify all facts that may support a party's

⁵ Liberty notes the District Court's concern with "why Liberty failed to approach (the city agency) and ask for a franchise." Liberty then argues that the District Court avoided credibility findings "that would have established that Liberty had sufficient assurances from the city that no franchise was required." (Reply at 9.) Such credibility issue can only be resolved in this hearing under the issue which the Commission specified and which Liberty now seeks to have deleted.

affirmative defense.⁶ Liberty is only entitled to notice of the issues to which it must respond. See 5 U.S.C. §554(b) (persons entitled to notice of hearing shall be timely informed of the matters of fact and law asserted).

8. The cases relied upon by Liberty are sui generis. On analysis, they do not support Liberty's argument and also are distinguished on the facts. In RKO General, Inc. WOR-TV, 47 F.C.C. 2d 941, 942 (1974), the Review Board found an obvious oversight in a failure to consider a guarantee in a prehearing amendment and the Board deleted a discrete financial issue. The issue here is far more complex and the facts asserted by Liberty are not readily established and do not dispose of the issue with the same assurance of an overlooked financing guarantee. In KRLA, Inc., 75 F.C.C. 2d 639, 642 (1980), the Commission approved a deletion of an issue that was incident to a settlement where the person effected by the issue would not receive a license and would not benefit from the settlement. There are no similar de minimis mitigating circumstances here. In Red Lion Broadcasting Co., Inc., the Commission was presented with an unopposed motion to delete an issue which would have an unintended estoppel effect in another Commission proceeding involving the same licensee, a situation which is so unique as to have no relevance to Liberty's Motion. In Lorain Community Broadcasting Co., 5 F.C.C. 2d 808, 809 (1977), a case relied on by Liberty and by the Bureau, the Commission approved the deletion of an issue on how expected operating revenue could make up a shortfall in a financial estimate of several thousand dollars after there was an amendment accepted that established a new sources of funding that would meet the shortfall. In that case, the deleted issue was mooted and the taking of evidence would have been a waste of time.⁷ There is no comparable situation here. Cf. Summit Broadcasting et al., 18 F.C.C. 2d 83, 84-85 (1969) (motion to delete financial issue in comparative case denied where the application which was the source for adding the issue did not clearly show that the applicant had included a \$12,000 item of depreciation). Id. Liberty has not "clearly" shown any error in what has been written in the Commission's HDO, let alone an error which is "obvious" to the Presiding Judge.

⁶ Liberty argues the general principle that agencies consider "all relevant factors and provide a reasoned decision" citing Penzoil v. FERC, 789 F. 2d 1128, 1139 n. 31 (5th Cir. 1986). But that authority relates to the record on appeal to the agency from a presiding judge's initial decision. Id. The holding does not apply to requisites of a designation order which gives prehearing notice of the issues to be tried.

⁷ The Commission also held:

It is well established that factual issues will not generally be resolved on the basis of interlocutory pleadings, and that in the absence of some obvious error on the part of the body designating the matter for hearing, issues will not be deleted. Id.

9. Liberty also relies on a ruling of this Presiding Judge in an unrelated proceeding. In interlocutory order in Georgia Public Telecommunications Commission, et al. (Roswell, Ga.), Memorandum Opinion and Order (Admin. L.J.) FCC 89M-2535, released October 26, 1989, an applicant party's motion to delete was granted where the Bureau had concurred by Comment that the structure of the moving party was inaccurately described in a designation order.⁸ The motion to delete was granted only with respect to a descriptive disclosure issue and it was granted solely for the purpose of comporting the true corporate structure of a party applicant to the record. There were no transactional facts in issue with respect to that relief. The party was still required to prove that it was not controlled or influenced by the alleged real-party-in-interest. The interlocutory ruling, while correct under the circumstances of the Roswell case, serves as no precedent for Liberty's Motion To Delete.

10. Finally, Liberty is required by the Commission to answer in this proceeding for its operation of an unfranchised cable system and its failure to report the operations to the Commission at times when Liberty's system apparently met the definition of "cable" under the Communications Act of 1934, as amended. The passage of legislation in 1996, which changed the definition of "cable" does not change retroactively the legal requirements for Liberty, as a Commission licensee, to obtain a local franchise and to report unfranchised activities to the Commission during the relevant period.

Order

Accordingly, for the foregoing reasons, IT IS ORDERED that the Motion To Delete Issue filed on April 9, 1996, by Bartholdi Cable Co., Inc., formerly known as Liberty Cable Co., Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁸ There were "Sonrise" real-party-in-interest issues designated against the movant. Those issues had been carried over from 14 other cases which had not been litigated because the cases had settled or were otherwise concluded with dismissals of the affiliated applicants before evidence of Sonrise's control and influence was received and considered.